**Masterform Tool Company, Cylinder Components, Inc., and Rrp Enterprises, Inc., a Single Employer *and* Union of Needle Trades, Industrial & Textile Employees, Local 76, AFL–CIO.**[1] Case 13–CA–32123

March 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On July 20, 1995, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.[3]

1. The judge found that the Respondent violated Section 8(a)(1) of the Act when setup men Guadalupe Zapata and Feliciano Rodriguez interrogated employees about their union activities and employee support of the Union, and when they threatened employees with layoff, termination, and plant closure if they supported the Union. The judge found that Zapata and Rodriguez were statutory supervisors and thus attributed their conduct to the Respondent. The judge based his findings that Zapata and Rodriguez were supervisors on the fact that they were perceived to be supervisors; that they assigned, transferred, and directed the work of employee broach operators, grinders, and saw operators; that they granted employees permission to leave work early; and that they wrote in the time and initialed the timecards for employees who forgot to clock in or out.

Contrary to the judge, we find that the record does not support a finding of supervisory status.

Section 2(11) of the Act defines a statutory supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The power must be exercised with independent judgment on behalf of management and not in a routine manner. Thus, the exercise of some "supervisory authority" in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status.[4] Further, the Board does not construe supervisory status too broadly because the employee who is deemed a supervisor loses his protected right to organize.[5] Therefore, the burden of proving that an individual is a supervisor is placed on the party alleging that supervisory status exists.[6]

The record shows that Zapata's and Rodriguez' assignment and direction of employees involves routine decisions typical of leadman positions that are found by the Board not to be statutory supervisors.[7] They assign work based on staffing needs and production requirements. Zapata and Rodriguez provide direction and guidance based on their greater skill and experience. There is no showing that any assignment and direction of work involved any exercise of independent judgment.

With respect to the transfer of employees, the record establishes that Zapata and Rodriguez have transferred three employees from broach machines to other machines. The record does not show, however, whether the transfer decision involved anything other than an attempt to equalize employees' work or to make employees happy. Accordingly, we are unable to find that independent judgment was required.[8] With respect to Rodriguez and Zapata granting time off, the record indicates only that on a few occasions they granted employees permission to leave early. The record fails to establish the circumstances surrounding their granting time off, including whether they were following established company policy. Under these circumstances, the record is insufficient to establish that the granting of time off involves the exercise of independent judgment.[9]

We also disagree with the judge's reliance on the fact that employees perceived Rodriguez and Zapata to be supervisors. "[T]he proper consideration is whether the functions, duties, and authority of an individual, regardless of title, meet any of the criteria for supervisory status defined in Section 2(11) of the Act."[10] Consequently, that employees may have perceived Rodriguez and Za-

[1] The Union was formerly known as the International Ladies' Garment Workers' Union.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule and administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center,* 321 NLRB 144 (1996), and *Excel Container,* 325 NLRB 17 (1997).

[4] *Bowne of Houston,* 280 NLRB 1222, 1223 (1986).

[5] *Adco Electric*, 307 NLRB 1113, 1120 (1992).

[6] *Chevron U.S.A.,* 309 NLRB 59, 62 (1992).

[7] *S.D.I. Operating Partners*, 321 NLRB 111 (1996).

[8] *Byers Engineering Corp.,* 324 NLRB 743 (1997); *Jordan Marsh Stores Corp.,* 317 NLRB 460, 467 (1995).

[9] *Bowne of Houston,* supra.

[10] *Waterbed World,* 286 NLRB 425, 426 (1987), citing *Bowne of Houston,* supra.

pata to be supervisors does not, without more, confer supervisory status on them.

We also find that Rodriguez' and Septa's higher wage rate does not confer supervisory status. Pay differential is a secondary indicia of supervisory status and, in the absence of primary indicia as enumerated in Section 2(11), is insufficient to establish supervisory status.[11]

For the above reasons, we conclude that the record does not establish that Zapata and Rodriguez are supervisors. The General Counsel failed to show that the authority exercised by them involved independent judgment. Accordingly, we find that Zapata and Rodriguez are not supervisors and dismiss the 8(a)(1) allegations attributed to them.

2. The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off employees Francisco Rodriguez, Marcial Armendariz, Juan Fidel Santillan, Salvador Cocoma, Porfirio Longoria, Manuel Castillo, and Miguel Pimentel for engaging in union activities.[12] In its exceptions, the Respondent contends that the judge erroneously relied on Zapata and Rodriguez' knowledge of the employees' union activity as part of the evidence of unlawful motivation. The Respondent thus argues that, because Zapata and Rodriguez are not supervisors, as the judge found, their knowledge of the employees' union activity may not be attributed to the Respondent.

In view of our finding above that Zapata and Rodriguez are not supervisors, we agree with the Respondent that their knowledge of the laid-off employees' union activities cannot be imputed to the Respondent. However, we infer that the Respondent indeed had knowledge of the employees' union activity. Such an inference is warranted here for several reasons. First, it is evident that the Respondent had general knowledge of the union campaign in view of its receipt of a telephone request for recognition by the Union on November 3, 1993. Second, the layoff occurred within days of the Respondent receiving the recognition request. Further, the layoff occurred shortly after the seven employees openly met on November 4, 1993, with union organizers just outside the doors of the plant. Finally, as found by the judge, the reason proffered by the Respondent for the layoff, i.e., lack of work, is wholly unsupported by the record and thus is pretextual.[13] Accordingly, in view of these factors, we find that the Respondent had knowledge of the employees' union activities,[14] and thus we adopt the judge's finding that their layoff violated Section 8(a)(3) and (1) of the Act.

3. The Respondent excepts to the judge's conclusion that the Respondent's unfair labor practices warrant the imposition of a *Gissel*[15] bargaining order. The judge found that the discriminatory layoff of the seven employees leading the organizing drive, the delay in recalling most of them, and the unlawful threats to close or move the plant would have a long lasting residual impact on the exercise of the employees' right to a fair election. For the following reasons, we disagree.[16]

First, given our finidngs about the superviosry status of Zapata and Rodriquez, we have reversed all of the judge's 8(a)(1) findings, including the Respondent's threats to close or move the plant, and have dismissed those allegations. Second, although the Respondent's November 8, 1993 layoff of the seven known union supporters had a severe impact on the employees' protected right to organize, we must also consider the fact that six of these employees were reinstated by at least February 1, 1994. In these circumstances, we find that there is an insufficient basis for concluding that a fair election could not be held at this time. Accordingly, we reverse the judge's finding that a *Gissel* bargaining order is warranted here.[17]

## ORDER

The National Labor Relations Board orders that the Respondent, Masterform Tool Company, Cylinder Components, Inc., and RRP Enterprises, Inc., Franklin Park, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or otherwise discriminating against any employee for supporting Union of Needle Trades, Industrial & Textile Employees, Local 76, AFL–CIO, or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Salvador Cocoma immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

[11] *J. C. Brock Corp.,* 314 NLRB 157, 159 (1994).

[12] All the employees except Cocoma were subsequently reinstated.

[13] The Respondent's sales reached a record high in October and November 1993. The day after the layoff, the Respondent increased overtime to meet production requirements. The following week, one of the laid-off grinders was recalled because of a shortage of grinder production. Overtime was increased again before the remaining laid-off employees were recalled.

[14] See *BMD Sportswear Corp.,* 283 NLRB 142 (1987).

[15] *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

[16] Inasmuch as we find that a *Gissel* bargaining order is not warranted in these circumstances, we find it unnecessary to pass on the judge's finding that the Union obtained authorization cards from a majority of unit employees.

[17] In view of our finding that a *Gissel* bargaining order is not warranted here, we find it unnecessary to pass on the Respondent's motions to reopen the record to introduce evidence pertaining to employee Thaddeus Beres' status as bargaining unit employee and to employee turnover.

(b) Make whole, commencing from the date of his unlawful layoff, employee Salvador Cocoma for any loss of earnings and other benefits suffered by him as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed as set forth in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

(c) Make whole commencing from the date of their unlawful layoff, employees Marcial Armendariz, Manuel Castillo, Porfirio Longoria, Miguel Pimentel, Francisco Rodriguez, and Juan Santillan for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.,* supra, with interest computed as set forth in *New Horizons for the Retarded,* supra.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs, within 3 days thereafter, and notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Franklin Park, Illinois copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 8, 1993.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

## NOTICE TO EMPLOYEES
## POSTED BY ORDER OF THE
## NATIONAL LABOR RELATIONS BOARD
## An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT lay off or otherwise discriminate against any of you for supporting Union of Needle Trades, Industrial & Textile Employees, Local 76, AFL–CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's order, offer Salvador Cocoma immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make him whole for any loss of earnings and other benefits resulting from his layoff, less any net interim earnings, plus interest.

WE WILL make Marcial Armendariz, Manuel Castillo, Porfirio Longoria, Miguel Pimentel, Francisco Rodriguez, and Juan Santillan whole for any loss of earnings and other benefits resulting from their layoff, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Salvador Cocoma, Marcial Armendariz, Manuel Castillo, Porfirio Longoria, Miguel Pimentel, Francisco Rodriguez, and Juan Santillan, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the layoffs will not be used against them in any way.

MASTERFORM TOOL COMPANY, CYLINDER COMPONENTS, INC., AND RRP ENTERPRISES, INC.

*Sheryl Sternberg* and *Librado Arreola, Esqs.* for the General Counsel.

*Richard L. Samson* and *Dwight D. Pancottine, Esqs., (Murphy, Smith & Polk),* of Chicago, Illinois, for the Company.

*Martin P. Barr, Esq. (Carmell Charone Widmer Mathews & Moss),* of Chicago, Illinois, for the Union.

## DECISION

## STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. This case was tried in Chicago, Illinois, on October 11–13, 26–28, and November 7–11, 1994. The charge was filed November 10, 1993,[1] and the complaint was issued December 30.

[1] All dates are in 1993 unless otherwise indicated.

About November 1, to undercut the union organizing drive, two hourly machine setup employees (found to be shop supervisors) threatened employees with layoff or termination and relayed President Larry Pippin's threat to close or move the plant if the employees supported the Union. The following week on November 8, Vice President Richard Perales laid off all seven members of the employee organizing committee, defeating the organizing effort. Although the Company claims a lack of work, its own records show that the October and November sales reached a record high for those months. During the first 5 weeks following the layoffs (excluding Thanksgiving week), the remaining employees worked a record amount of overtime, averaging 14.7 hours of overtime a week. A high percentage of the hourly employees were working from 16 to 17-1/2 hours of overtime.

The primary issues are whether the Company, the Respondent, (a) unlawfully interrogated and threatened employees and (b) discriminatorily laid off the seven union organizers, violating Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) and if so, whether a bargaining order is appropriate and required to remedy the unfair labor practices.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Company, and the Union, I make the following

## FINDINGS OF FACT

## I. JURISDICTION

The Company—Masterform Tool Company (Masterform), Cylinder Components, Inc. (CCI), and RRP Enterprises, Inc. (RPP), stipulated to be a single employer (Tr. 892–893)[3]—manufactures end caps, covers, and mounting accessories for cylinders at its facility in Franklin Park, Illinois, where it annually ships good valued over $50,000 directly outside the State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### *A. The Circumstances*

Masterform purchases steel and aluminum bars, which are sawed into blocks to make end caps and covers for cylinders in the hydraulic industry. The blocks are moved on skids from the saws first to the grinding machines to be ground to the proper thickness, or directly to broach machines (or a computerized Mazak machine) to be precision cut, trimming the width and length to the required sizes. Blocks are deburred either by a second broach operator with a hand file at the broach machine or on one of the two sanding machines, then packed and shipped or placed in inventory. (Tr. 13–20, 752–753, 793–807, 1187–1188; R. Exh. 28.)

A second shift has been required because the five saws and three grinders "can't keep up" with the 14 broach machines (Tr. 829, 846; R. Exh. 29).

Two RRP machine operators work in the adjoining RRP plant, manufacturing cylinder mounting accessories for CCI, whose two employees pack and ship the accessories, together with the Masterform precision blocks. The two RRP and two CCI employees are on the Masterform payroll. (Tr. 815–817, 820, 827–828, 1559–1560; R. Exhs. 28, 49.)

As found below, the Company followed the policy of exclusively hiring—at the $4.25 minimum wage to fill vacancies in the starting job of broach operator—untrained Mexican immigrants who were referred by its current shop employees, all of whom were of Mexican origin. The two Spanish-speaking broach setup men, Guadalupe Zapata and Feliciano Rodriguez were, as found, shop supervisors on the first shift over the broach operators and the junior grinder and saw operators. They trained, assigned, and directed the broach operators, inspecting their work throughout the day. If the broach operators' performance, work habits, and productivity were found to be satisfactory and if "they seem pretty sharp to read measuring instruments" after they have worked under the direction of the setup men several months, they may be transferred to a grinder or saw. (Tr. 54, 72–78, 98–99, 186, 348, 371–377, 391–395, 519–521, 829–831, 833–834, 842, 918, 930, 1034, 1430; R. Exh. 29.)

By Friday, October 29, as also found below, a majority of 18 of the 33 hourly shop employees had signed union authorization cards. Seven of the cardsigners were on the employee organizing committee.

Until then the Union had succeeded in keeping the organizing effort a secret from the Company. It had conducted the campaign away from the plant, except on one evening (Tuesday, October 26) when the union organizers and several members of the employee organizing committee entered the plant and talked to the employees on their second-shift lunchbreak, soliciting their support. No members of management were present (Tr. 584–585).

On Saturday, October 30, however, one of the cardsigners alerted Feliciano Rodriguez to the union organizing by asking him if he had signed a union card (Tr. 1589). About Monday, November 1, the Company's antiunion campaign began. After Rodriguez and Zapata were called to the office, they began interrogated employees about the Union, threatened layoff or termination, and relayed President Pippin's threat to close or move the plant if the employees supported the Union.

The following week, on November 8, despite the hiring of four new employees in October to keep up with the record sales for that month and despite the large amount of overtime being worked, the Company temporarily eliminated the second shift. It reassigned the six second-shift employees to the first shift and laid off all seven members of the employee organizing committee, claiming "lack of work."

On November 9 the Company lengthened the workday from 9-1/2 to 10-1/2 hours and regularly assigned 5 hours of overtime work on Saturdays (Tr. 921, 1178; R. Exh. 80). A week later on November 15, because of a shortage of grinder production—despite the added overtime—it recalled one of the three laid-off grinder operators (Tr. 869, 1049; R. Exh. 80). In January 1994, the Company recalled two other employees. On February 1 it decided to reinstated the second shift and sent recall letters to the four remaining laid-off employees (Tr. 367, 412, 873, 881; R. Exhs. 6, 53A, 79).

[2] The Company's unopposed motion to correct the transcript, dated January 16, 1995, is granted and received in evidence as R. Exh. 82. The joint motion to substitute revised copies of G.C. Exh. 35 and R. Exh. 79 (see Tr. 1654, 1656) is granted.

[3] The caption of the case was amended at the trial (Tr. 1610) to name the three corporations as a single employer.

*B. Interrogation and Threats*

As indicated, the Company's antiunion campaign began about Monday, November 1, after one of the card signers, shipping clerk Martin Rivera, alerted Feliciano Rodriguez on Saturday, October 30, to the union organizing campaign (Tr. 1560, 1589).

Broach operator Onecimo Castillo credibly recalled hearing Feliciano Rodriguez and Zapata being called to the office over the loud speaker. After returning from the office, Rodriguez told Castillo at his machine that management wanted to know if employees were trying to bring the Union in the shop. Rodriguez told him that they said in the office "if we had joined the union they would close the factory or they would fire those who wanted to establish the union." (Tr. 266, 297–299, 316; R. Exh. 14 p. 2.)

Either that same day or the following day, as Castillo further credibly recalled, Zapata spoke to him about the Union as they were going to their work areas. Zapata said it would not be "beneficial" for Castillo to join the Union and "those who wanted to join the union that they would fire us or they would close the company." (Tr. 266–267, 299; R. Exh. 14 p. 2.)

Broach operator Porfirio Longoria also credibly recalled that about a week before his November 8 layoff, Zapata asked him "if I was with the union" and said that "if I was with the union, they would fire me or lay me off" and that "the owner [President Pippin] didn't care about closing the plant if the Union was brought in" (Tr. 338–339; R. Exh. 15 p. 2).

Meanwhile, Zapata twice interrogated saw operator Miguel Pimentel about the Union. Pimentel credibly testified that about a week before he was laid off, Zapata asked him "if I wanted to join the union, and I said yes." Two days later Zapata asked "if I was in the union" and he answered yes. (Tr. 383.)

I note that on Wednesday of that week, November 3, the Union filed a petition for an election. It also sent the Company a recognition request by telegram, stating it was aware that Zapata and Perales were threatening union supporters and "any further violation of the law will be brought to the attention" of the NLRB. (Tr. 608–613; G.C. Exh. 21; R. Exh. 26.)

About 6 o'clock that Wednesday evening, November 3, Union Organizers Kim Mussman and Juan Segura and four members of the employee organizing committee went to the home of grinder operator Savino Rodriguez to seek his support. They found his brother Feliciano Rodriguez there. Someone in the group asked Feliciano Rodriguez what he thought about the Union. As credibly testified by Mussman (who impressed me most favorably as a truthful, forthright witness), he answered "that for him it was fine if the union came in," but "he couldn't be a part of it" because he was "part of management." (Tr. 604–605.)

As Mussman further testified, Feliciano Rodriguez stated that he knew "the Company did not want a union there" because "the other day" he had been in the office, talking to the owners (Pippin and his wife Marla Pippin). "And I don't remember who, but he said they had told him that they didn't care about their orders, that they could easily move the plant or close it." Rodriguez added that "the owner [Pippin] is very rich and that for him . . . the company was just like a toy" and "doesn't mean anything to him. He is so rich he could easily move." Rodriguez stated that he himself "knew that there were back orders in the company . . . that they were behind in their orders." (Tr. 737, 605–608.)

Organizer Segura credibly testified that Feliciano Rodriguez told them that "the owner" said that if the employees join the Union, "he will move far away from Chicago or close the company down. He got enough money that he don't need that. It was for him a toy. If they bring the union in, he will close the shop down or move it." (Tr. 436.) Broach operator Salvador Cocoma (who impressed me favorably by his demeanor on the stand as a truthful witness) credibly recalled further that Rodriguez said that "Mr. Perales told the owner that there were some back orders and that the owner answered him that he didn't care" (Tr. 180).

On Thursday, November 4, Zapata gave broach operators Cocoma and Longoria a ride home after work. On the way Zapata asked them if they were joining the union and they answered yes. Then Zapata asked Cocoma if he was married. When Cocoma did not answer, Zapata stated that "those who are married to think of it very well because we would be fired" for joining the Union. (Tr. 183–184.) Longoria recalled that Zapata said that if the Union came in, the owner would close the factory (Tr. 340; R. Exh. 15 p. 2).

In the Company' defense, Zapata and Feliciano Rodriguez denied interrogating and threatening employees.

According to Feliciano Rodriguez, Organizer Segura said in the home visit (on November 3) that "we should have a union because they could fire us from our jobs" and that he responded by asking Segura "what would happen if the owner closed the company, we would lose 20 years in there." Rodriguez claimed that Segura then said, "[T]they would never close that factory" and he asked Segura "what would happen if they moved it somewhere." Rodriguez denied having had any discussions with the owner about the Union, denied that he said anything in the meeting about back orders, and denied that he told anyone in the Company about this meeting. He also denied talking to Castillo about the Union and denied telling any employee that the plant would close or move if the Union got in. (Tr. 1363–1366.)

Feliciano Rodriguez did not deny Mussman's credited testimony that he told her "he couldn't be a part of" the Union because he was "part of management."

Zapata, in turn, denied telling the employees in the car ride home (on November 4) that the Company would close if the Union got in, or that he said the employees would be fired if they joined the Union. He claimed that he merely repeated stories he had heard about unions in other places. He also denied telling any employees that the Company would close if the Union got in and denied ever asking Pimentel whether he was for the union. (Tr. 1437–1440, 1454–1456.)

By their demeanor on the stand, both Guadalupe Zapata and Feliciano Rodriguez appeared willing to give any testimony that might help the Company's cause. I discredit their denials. I also discredit President Pippin's denial (Tr. 882) that he ever had a conversation with Rodriguez about whether he intended to close Masterform if a union got in there. His credibility is discussed later.

Also as discussed later, I reject the Company's contention in its lengthy brief (at 14–55) that Guadalupe Zapata and Feliciano Rodriguez were not supervisors and that these "alleged unlawful acts" cannot be imputed to the Company. I further reject the Company's arguments (at 57–74) that the testimony of the General Counsel's witnesses should not be credited and that the evidence does not support the 8(a)(1) allegations.

I find that the threats to lay off or terminate union supporters and to close or move the plant, and that the interrogation particularly in the context of the threats, clearly were coercive and violated Section 8(a)(1) of the Act. I also find this credited testimony is relevant in determining the Company's motivation the following week when it laid off all members of the employee organizing committee.

### *C. Layoff of Organizing Committee*

#### 1. Employee organizers identified

The Union and the seven members of the employee organizing committee decided to meet at the 12:30 p.m. lunchbreak on Thursday, November 4, outside the plant near the lunch truck "to bring together as many employees as possible to then go into the office to speak with management about recognizing the Union" (Tr. 464–468, 614; R. Exh. 14 p. 2).

The Union had already filed a petition for an election, supported (as found) by a majority of 18 of the 33 hourly shop employees. It was evidently fearful, however, that the threats being made that week would decimate the employee support. On Tuesday evening, November 2, before the Union filed the petition on Wednesday, Union Organizers Mussman and Segura and two of the employee organizers returned to the plant to urge employees on their second-shift lunchbreak not to be afraid of losing their jobs and to stay united (Tr. 1618–1621, 1645–1646). A week earlier when the union organizers entered the plant and solicited the support of the evening crew—before Zapata and Feliciano Rodriguez began interrogating and threatening employees—one of the employees had "wanted to know if he could get fired for signing a card" (Tr. 584–586).

It was on Wednesday evening, after the petition was filed, that Feliciano Rodriguez informed the union organizers directly that despite the back orders, President Pippin had stated he would move or close the plant if the employees joined the Union, as found above.

Evidently because of the threats being made that week, none of the other cardsigners joined the seven employee organizers in the November 4 meeting near the lunch truck. The assembled group discussed whether they should proceed to the office anyway to seek union recognition. After about 6 minutes, when no other employees appeared, committee member Miguel Pimentel returned to the plant. The remaining group decided against going to the office as they had planned. (Tr. 504–505, 614–616; R. Exh. 16 p. 2.)

Meanwhile, Zapata and Feliciano Rodriguez came to the lunch truck to buy drinks. Each of them observed the assembled employees with the union organizers and then returned to the plant. Zapata arrived first while Pimentel was still there. When Rodriguez arrived, he observed four of the same employee organizers who visited him the evening before. Whether or not either Zapata or Rodriguez overheard the discussion about going to the office to seek union recognition, Rodriguez observed that the employees were meeting with the same union organizers he had met on the previous evening. (Tr. 94, 505, 604, 614, 616; R. Exh. 16 p. 2.)

Under the circumstances, I find that this meeting of members of the employee organizing committee with the union organizers placed the Company on notice that the seven employees were leading the organizing drive.

Because both Zapata and Feliciano Rodriguez—after they were called to the office—were engaging in the Company's antiunion campaign that week, interrogating and threatening employees and relaying President Pippin's threat to close or move the plant, I infer that they conferred with each other and with the officials about what they had observed at the lunch truck. Even if Zapata had not previously known that Mussman and Segura were union organizers, Rodriguez undoubtedly inform him that they were the union representatives who visited him the evening before.

When called as a defense witness, Feliciano Rodriguez admitted seeing five or six employees with the two union representatives who were outside his house earlier. I discredit his claims that he merely saw them through the door and did not go outside the plant and his denials that he told President Pippin, his wife Marla Pippin, and Vice President Perales what employees he saw with the union representatives. (Tr. 1367, 1369, 1405–1406, 1426.) I also discredit Zapata's denial that he ever saw any employees before the November 8 layoffs with representatives of the Union out by the lunch truck. He admitted that he did know Segura (they were born on the same ranch in Mexico) and that he did see a lady (Kim Mussman) with him at the lunch truck, but claimed that "I don't know if she was selling something or if she was buying something." (Tr. 1440–1442.)

Zapata was already aware that Pimentel, who initially joined the group near the lunch truck, was supporting the union organizing drive. When Zapata twice interrogated him that week, as found above, Pimentel had first admitted that he wanted to join and later that he was in the Union. Moreover, on the previous afternoon at quitting time, Zapata spent about 5 minutes in the doorway, watching as Pimentel talked to Mussman at the parking lot (Tr. 384–385, 618–619). I discredit Zapata's denial (Tr. 1442).

#### 2. All seven organizers laid off

On Friday, November 5 (1 day after the Company learned the identity of the employee organizers), the Company posted a letter instructing the six employees on the second shift to report to the first shift on Monday (Tr. 1221).

On Monday morning, November 8, the Company reassigned the six second-shift employees to operate machines on the first shift. Vice President Perales laid off, supposedly for "lack of work," all seven members of the employee organizing committee listed below, telling them "we would recall them as soon as possible or as soon as business picked up" (Tr. 49, 820; G.C. Exh. 28 p. 9):

Marcial Armendariz, grinder operator/helper
Manuel Castillo, RRP machine operator
Salvador Cocoma, broach operator
Porfirio Longoria, broach operator
Miguel Pimentel, saw operator
Francisco Rodriguez, grinder operator
Juan Santillan, grinder operator

When the second shift was eliminated once before, there were no layoffs (Tr. 1181, 1184). President Pippin testified (Tr. 848–849):

> A. In September of '89 I stopped the night shift through September of 1991. I did not run a second shift.
>
> Q. And why was that?
>
> A. Production was down. We were in a recession and I didn't need the production to keep up with first shift.
>
> . . . .
>
> Q. And do you recall why you reinstated the second shift at that time?

> A. Yes. Work was picking up again. We were getting busy and falling behind on orders so I decided to put the second shift back on.

I note that in October 1991, when the second shift was reinstated "to keep up with the first shift," the monthly sales were $437,515, followed by sales of $340,488 in November and $368,059 in December. In 1992, the sales increased to $467,028 in October, $395,168 in November, and $388,426 in December. In 1993, when the Company eliminated the second shift, the sales reached a record high for those months, $469,393 in October and $462,867 in November, and near a record high of $383,808 in December. (Tr. 1654; G.C. Exh. 35.)

Thus in November 1991, a month after the second shift was reinstated, the Company retained the second shift with sales of $340,488. Yet, on November 8, 1993, a week after it discovered the union organizing drive, it not only eliminated the second shift but also laid off all seven members of the employee organizing committee, despite sales that month of $462,867—which were 35.9-percent higher than the sales in November 1991.

Pippin and Perales gave different versions of why there were *seven* layoffs of first-shift employees (although there were only *six* second-shift employees reassigned to the first shift). Misstating the number of employees on the second shift, Pippin testified (Tr. 866) that on November 2 (that is, after the Company's antiunion campaign began):

> I told [Perales] we are going to eliminate the second shift, and I said we are going to have to lay off seven employees, what we had on second shift, so we figured we would lay off seven.

Pippin next denied that he decided on November 2 to lay off seven employees (Tr. 866–867):

> No. I basically told Richard [Perales] we were going to have to decide who we want to lay off. He just knew the amount would be seven because that is how many we had on the second shift.

I note that November 2 was before the identity of the seven employee organizers was revealed to the Company by the November 4 lunch truck meeting.

Perales gave a different purported reason, which was equally unpersuasive. He claimed that he chose the number seven because of the number of available production machines (Tr. 1032, 1147):

> A. Seven was a good number to me because of the ratio of employees to machines that we had available to run in production.
>
> . . . .
>
> Q. Now, did you pick the number seven people to lay off because that is how many were on the second shift?
>
> A. No.
>
> Q. You just picked seven based on?
>
> A. How many machines we had to how many employees we had.

Neither Perales nor the Company in its brief offers any suggestion why there were enough jobs on production machines the previous week for the seven laid-off employees, but not enough production machines on November 8 when six second-shift employees were reassigned to the first shift, requiring the layoff of the seventh employee. I note, as discussed below, that 1 week later there were enough machines when the Company recalled one of the production employees because of a shortage of grinder production and also in January 1994 when it recalled and assigned many hours of overtime to two other laid-off production employees—before the Company decided on February 1 to reinstate the second shift.

I discredit Vice President Perales' explanation as a fabrication.

I note that before the trial, the Company contended that President Pippin decided to eliminate the second shift on November 4, not November 2. It asserted in its December 9, 1993 statement of position (G.C. Exh. 28 p. 5), about a month later, that "on November 4, 1993, Larry Pippin decided to cease second shift operations." In its January 13, 1994 answer (G.C. Exh. 1H par. 6A), the Company stated that "Masterform admits that on November 4, 1993, it decided to cease second shift operations."

By the time President Pippin testified on October 28, 1994 (the 6th day of the trial, after the General Counsel completed his case-in-chief), the Company had shifted its position. The previously admitted Thursday, November 4 date would have meant that the Company decided to eliminate the second shift on the date of the meeting near the lunch truck (when, as found, the Company learned the identity of the seven employees who were leading the organizing drive).

Upon being asked, "When did you make the decision to eliminate the second shift," President Pippin answered (Tr. 866) that he spoke to Perales "and my wife on Tuesday [*November 2*] about I was going to eliminate the second shift."

I infer that the correct date was Thursday, November 4, the date that was admitted much closer to when the decision was made. I do not doubt, however, that on November 2, after the Company's antiunion campaign began, the Company was already planning the layoff of some of the employees. Perales testified (Tr. 1017–1018) that on Wednesday, November 3, he asked Pippin's sister Lynn for a current list of employees (R. Exh. 65) for him to "review who we would keep and who we would lay off." I discredit, however, Perales' claim (Tr. 1031) that he did not make his "final decision as to who" to lay off until Saturday, November 6 (although he was laying off all seven employee organizers who attended the Thursday lunch truck meeting).

Even apart from the question of whether the Company's motivation for eliminating the second shift and laying off any employees was discriminatory, I find that there was no nondiscriminatory reason for laying off all seven members of the employee organizing committee—one more employee than the number of second-shift employees reassigned to the first shift.

3. Fabricated defenses

*a. Prior cancellation of aluminum order*

Despite record sales in October and November for those months, as discussed above, the Company offered evidence to prove that there actually was a "lack of work" (as Vice President Perales told the seven members of the employee organizing committee on November 8 when he laid them off).

President Pippin testified that after record sales in June, July, and August (a monthly average of $544,960), "toward September and October things started falling off and getting a little slower," as confirmed by weekly and monthly reports he was receiving. He testified that Perales was reporting to him in "mid-October that we were getting some rumors about slow-

downs." He admitted, however, that in the last quarter of the year "things usually start slowing down." (Tr. 849–850, 860, 864; G.C. Exh. 35.)

Specifically, he testified (Tr. 859–861) that in mid-October, Vice President Perales told him that Hydro-Line Manufacturing (which accounted for 60 percent or more of the Company's aluminum business, Tr. 1192) canceled their aluminum order, which was scheduled for delivery "I believe it was like . . . a November deliver date" and which was worth about $38,000.

In fact, there was no $38,000 aluminum order scheduled for delivery in November.

There were 12 small Hydro-Line blanket orders for various sizes of aluminum blocks and none of the orders had a November delivery date. In 1993, the Company had made seven shipments of aluminum blocks on these blanket orders, from February 22 to October 18, for a total amount of $6371—a minuscule fraction of the $380,000 or $390,000 in total sales (of steel and aluminum blocks) to Hydro-Line that year. There were no scheduled delivery dates for the remaining portions of the 12 blanket orders, totaling $33,823. (Tr. 860; G.C. Exhs. 30, 32; R. Exhs. 54–63.)

After the middle of June, the only shipments of aluminum blocks to Hydro-Line were small shipments of $315 on August 20, $177 on October 4, and $596 on October 18, totaling only $1088. The Company knew that a competitor had cut the price of aluminum blocks and was taking this business. The Company had decided not to lower its prices because "there is not enough margin in it for us." In September a Hydro-Line purchasing agent had informed Perales that "they thought they might be canceling" the blanket orders. (Tr. 981–982, 1136–1137, 1183, 1192.)

I find it is obvious, under these circumstances, that the later cancellation of the remaining aluminum orders was not a factor in the decision to lay off employees. None of the small blanket orders had been scheduled for delivery. Weeks or months earlier the Company had decided to largely abandon this aluminum business with Hydro-Line to a price-cutting competitor, rather than meet the lower prices for aluminum blocks. Its peak sales in October and November were mainly steel block sales, which were not affected by the cancellation.

Moreover, the documentary evidence further shows that there had been no cancellation in mid-October (2 weeks before the Company's antiunion campaign). The cancellation occurred *after* the layoff of the seven members of the organizing committee. Notice of the cancellation was sent by fax (G.C. Exh. 31) on November 12—which was 4 days *after* the layoffs. Pippin admitted (Tr. 903) his belief that if an oral cancellation had been given to Perales "in the regular course of business," this confirmation would have been sent nearly the same day. Perales admitted on cross-examination (Tr. 1144, 1168) that the November 12 faxed cancellation is the only document indicating the date of the cancellation and that he had no discussion with Hydro-Line "about them sending the fax before they actually sent it."

I discredit, as fabrications, President Pippin's testimony about a mid-October cancellation of a $38,000 Hydro-Line aluminum order, scheduled for November delivery, and about there being a lack of work.

I discredit Vice President Perales' claim (Tr. 1008–1010, 1138) that although "I don't recall the exact date," Hydro-Line orally canceled the aluminum orders the *middle to late October*. I also discredit, as further fabrications, his claims (Tr. 1016–1017) that in *mid-October*, "I indicated to Mr. Pippin that I think we should cease our second shift and/or determine a layoff or both" and that toward *the end of October,* "I told him what we needed to do and he said go ahead." This would fix the date of the decision to eliminate the second shift in October, contrary to both Pippin's testimony that it was November 2 and the Company's pretrial position that it was November 4.

*b. Excessive employees*

President Pippin testified (Tr. 849) that before the November 8 layoffs, the Company had *37 employees*—the same number it had in August, 1 of the 3 summer months when the Company had record sales and "more employees than I ever did before." His wife Marla Pippin, Masterform's secretary-treasurer, testified (Tr. 1220) that she had expressed the opinion that "we were slow. We couldn't support, I didn't think, paying that many people. We had a large number of people working for us so I thought we should have the layoff."

The Company's own records (G.C. Exh. 29; R. Exh. 79) present an entirely different picture. The Company was hiring new employees in October to replace employees who were terminated (quit or discharged). One employee (Marcelino Carrizal) was terminated in September and three (Romero Cameras, Rafael Martinez, and Fernando Ornelas) in October. A fifth employee (Rafael Gomez), who was hired the first week in October, was terminated the fourth week in October.

The Company hired Martin Querrero on October 4 and Salvador Cocoma on October 11. On October 26—when Marla Pippin claimed she thought they "couldn't support" those already on the payroll—the Company hired Samuel Torres. To keep up production to meet the record sales (for those months) in September, October, and the first week in November, the Company assigned hourly employees an average of 11.6 hours of weekly overtime during the 8 weeks from September 13 through November 7 (the day before the layoffs).

During the week before the November 8 layoffs, there were *35 hourly employees* on the payroll, including setup men Guadalupe Zapata and Feliciano Rodriguez.

On November 9, the next day after the layoffs—not November 15, as Perales claimed (Tr. 1154)—the Company had to add an extra hour of daily overtime to meet production requirements. The first-shift workday was extended from 9-1/2 hours (6:30 a.m. to 4:30 p.m.) to 10-1/2 hours (6:30 a.m. to 5:30 p.m.). (Employees on the second shift had been working 10 hours a day.) On November 15, because of a shortage of grinder production, the Company recalled Juan Santillan, one of the three laid-off grinder operators. During the first 5 weeks after the layoffs (excluding Thanksgiving week), most of the employees were working 5 hours of overtime each Saturday. I discredit Perales' claim that the production employees were not working overtime regularly on Saturdays, but only "an intermittent Saturday." *The average weekly overtime was increased to 14.7 hours,* a record high. Each week a high percentage of the employees worked from 16 to 17-1/2 hours of overtime. (Tr. 869, 1125; R. Exhs. 79, 80.)

When President Pippin was asked on direct examination about changing the shift hours (on the *first* day after the layoffs, to end the shift at 5:30 p.m. instead of 4:30 p.m.), he answered (Tr. 868–869): "About a *week* later [emphasis added] I increased the first shift one hour" because the "trucklines weren't making it there in time to pick up the finished product." He was claiming that he assigned all the hourly employees an extra

hour of overtime so that there would be shipping clerks present to load trucks that previously had been loaded on the second shift. He gave the same answer on cross-examination, but finally admitted that "the rest of the employees had to work an additional hour in order to keep production sufficient to meet orders." (Tr. 920–921.) President Pippin did not impress me as being a candid witness.

Thus on November 9, the day after the layoffs, the Company was aware that it required even more overtime to meet production requirements.

The Company continued assigning many hours of overtime after the Christmas holiday season. The January 1994 sales were $439,245, as compared to $442,049 in January 1993 when the Company (with a second shift) had *37 hourly employees* on the payroll during the second and third weeks (6 months *before* the busy 1993 summer season). It recalled saw operator Miguel Pimentel on January 10, 1994, and assigned him and most of the other employees 17-1/2 hours of overtime that week. It recalled broach operator Porfirio Longoria during the week ending January 23, when most of the employees worked 17 or more hours of overtime. During the week ending January 31, Pimentel, Longoria, and most of the other employees worked from 17 to 19-1/2 hours of overtime. (Tr. 367, 412; R. Exh. 79.)

I find that the Company's defense that there was an excessive number of employees was clearly fabricated.

Finally on February 1, 1994—not February 6 as President Pippin testified—when "we were falling behind on production" (despite the recall of two laid-off employees in January), Pippin decided to reinstate the second shift and sent recall letters to the remaining laid-off employees (Tr. 873, 881; R. Exhs. 6, 53A, 79). He falsely testified that the Company did not recall any of the laid-off employees, besides Santillan, before February 1, 1994 (Tr. 881).

All of the remaining laid-off employees returned to work, except Salvador Cocoma, who did not receive the recall letters (Tr. 194–198; R. Exhs. 6–9). I note that the Company introduced a postal receipt (R. Exh. 8) showing that the third recall letter to Cocoma's old address was sent on February 23, 1994, by certified mail, return receipt requested. The Company did not attach a return receipt, showing delivery.

*c. No knowledge of union organizing*

On Wednesday, November 3 (after the Company's antiunion campaign began, as found, and 5 days before the layoffs), the Union filed a petition for an election and sent the Company a recognition request by telegram, stating it was aware that Zapata and Perales were threatening union supporters and "any further violation of the law will be brought to the attention" of the NLRB (Tr. 608–613; G.C. Exh. 21; R. Exh. 26).

Union Organizer Mussman, who sent the telegram, instructed the telegram company to send the message by postalgram, but also to "phone it in that day" (Tr. 689). The Company, however, did not receive the NLRB petition and the mailgram through the mail until Monday morning, November 8. Marla Pippin credibly testified that she did not open the mail until after the layoff of the seven employees that morning. (Tr. 1224; R. Exhs. 26, 52.)

The Company does not specifically deny that it received the telephone message. Pippin, however, denied (Tr. 882) that before receiving the mailgram and petition, he had any knowledge of union organizing, and Perales denied (Tr. 1047) that he knew that a union was organizing before the layoffs.

In view of the credited testimony to the contrary, as discussed above, and because both President Pippin and Vice President Perales appeared to lack candor on the witness stand, I discredit the denials as fabrications.

4. Concluding findings

As found, setup man Feliciano Rodriguez discovered the union organizing campaign on Saturday, October 30. Early in the week of November 1, after he and setup man Guadalupe Zapata were called to the office, the two alleged supervisors began the Company's unlawful antiunion campaign, interrogating employees about the union activity, threatening employees with layoff or termination, and relaying President Larry Pippin's threat to close or move the plant if the employees supported the Union.

On Wednesday, November 3, Vice President Perales requested a list of the current employees "to review who we would keep and who we would lay off." On Thursday, the next day, the Company discovered the identity of the seven employee organizers and decided to eliminate the second shift. On Monday, November 8, the Company assigned the six second-shift employees to operate machines on the first shift and laid off all seven members of the employee organizing committee supposedly, for "lack of work."

The Company's sales reached a record high for those months in October and November. The Company had been hiring employees in October to meet the production demands. During the 8 weeks preceding the November 8 layoffs, the hourly employees were working an average of 11.6 hours of weekly overtime.

On November 9, the day after the layoffs, when the Company was aware that it would be required to assign even more overtime to meet production requirements, it extended the 9-1/2-hour workday to 10-1/2 hours. It recalled a laid-off grinder operators the next week because of a shortage of grinder production. It increased the weekly overtime to an average of 14.7 hours during the 5 weeks after the layoffs (excluding Thanksgiving week). A high percentage of the hourly employees were working from 16 to 17-1/2 hours of overtime.

Particularly because of the timing of the layoffs (the week after the Company began its unlawful antiunion campaign through the setup men), I find that the General Counsel has made a strong prima facie showing that the employees' union organizing activities was a motivating factor in the Company's decision to lay off the seven members of the employee organizing committee. *Wright Line*, 251 NLRB 1083 (1980). Having found that the Company's defenses were fabricated, I find that it has failed to meet its burden of proof that it would have laid off the employees in the absence of the union activity.

Accordingly I find that the Company discriminatorily laid off Marcial Armendariz, Manuel Castillo, Salvador Cocoma, Porfirio Longoria, Miguel Pimentel, Francisco Rodriguez, and Juan Santillan on November 8, 1993, violating Section 8(a)(3) and (1) of the Act.

*D. The Union's Majority Status*

1. Valid cards in evidence

The General Counsel introduced in evidence 18 authenticated union authorization cards, dated from October 15 through 29 (G.C. Exhs. 2–8, 10–20). The text of each card, written both in English and Spanish under the name of the Union, is the same:

> I AUTHORIZE THE ABOVE TO REPRESENT ME IN COLLECTIVE BARGAINING.

Thus, the authorization cards are "single-purpose cards, stating clearly and unambiguously on their face that the signer designates the union as his representative." *NLRB v. Gissel Packing Co*., 395 U.S. 575, 606 (1969).

The credited testimony is replete that the union organizer read the text of the card at the meetings when handing the cards out and that each of the employees read the card before signing it (Tr. 124, 174, 379, 400, 443, 470, 500, 560, 572, 592, 598). In one instance the employee read the card and authorized another employee to sign it because of a smashed finger (Tr. 174, 333–334). Not only does the card clearly state that it authorizes the Union to represent the employee, but the union organizers made a practice of explaining this purpose (Tr. 124, 214, 244, 260, 290, 401, 409, 425–428, 452, 470–472, 572, 577, 595, 597).

There is no evidence suggesting that any of the card signers was told that the cards would be used solely to obtain an election. The Company, however, contends in its brief (at 108–110) that "various employees were told the purpose of signing the card was to help the Union obtain an election" and that two of the card signers, Marcial Armendariz and Salvador Cocoma (laid-off members of the employee organizing committee) understood "that an election would be the result of having signed the card."

In making these contentions, the Company ignores Armendariz' credited testimony (Tr. 560) that when he read the card, he understood "that the Union would represent me," as well as Cocoma's credited testimony (Tr. 214) that the union representatives told him that the purpose of signing the card was to "belong to the union." The Company also ignores the *Gissel* holding, 395 U.S. at 606–607, that "There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election."

In addition, the Company challenges the cards signed by three of its defense witnesses, employees Abel Leon, Martin Rivera, and Gusmaro Rivera.

*Abel Leon*. I discredit second-shift employee Leon's testimony that on Friday evening, October 29 (that is, before the Company became aware of the union organizing), he told Union Organizer Mussman at the plant not to bother him anymore, that "I made a mistake signing the card" (but not asking for his card back). On rebuttal, Mussman credibly denied that this happened.

As Mussman testified, it could not have happened on Friday evening, because that is when she hosts a study group at her home. Neither did it happen on Tuesday evening, November 2 (after the Company's antiunion campaign began), when she and three others returned to the plant to urge the employees on the second shift not to be afraid of losing their jobs and to stay united. One of the employees stated that we people from Michoacon, a State in Mexico, "will not turn back," and "they agreed that they were all going to stick together." Mussman had no separate conversation with Leon. (Tr. 1618–1621.) Employee organizer Armendariz, also on rebuttal, credibly confirmed that none of the second-shift employees said anything to the contrary to Mussman (Tr. 1641–1646, 1651–1652). Armendariz, like Mussman, impressed me most favorably as a truthful, forthright witness.

*Martin Rivera*. As Union Organizer Segura credibly testified, Martin Rivera signed his card (on October 28) at the union hall, where Segura told him that "[i]f you want to sign, be with your friends, organize the union, just sign the card and we will represent you" and *if the Union gets a majority*, "we come and file a petition and then we go to an election" (Tr. 428–429, 451–452). Rivera checked the "Yes" box on the card, besides the words, "I will serve on Committee" (G.C. Exh. 7).

I discredit Rivera's claim that outside the plant earlier that Thursday, October 28, Secura had told him that "almost everybody signed the cards" (Tr. 1570). I also discredit Rivera's claim that about 4:30 p.m. (quitting time) on Monday, November 1, he asked Mussman "if she could give me my card back because I don't want the union." By his demeanor on the stand, he did not appear to be a truthful witness.

Mussman credibly testified on rebuttal that she was present when Segura talked to Rivera outside the plant on October 28 and that neither she nor Segura "ever told Martin Rivera that almost everyone had signed cards" (Tr. 1613–1614). She knew that on Monday, November 1, she was not at the plant, because she was with employee organizer Francisco Rodriguez in Chicago, making house calls. She credibly denied that Rivera ever asked her for his authorization card back. (Tr. 1611–1612.)

*Gusmaro Rivera*. Martin Rivera claimed that on Monday, November 1, when he asked for his card back, his brother Gusmaro was present (Tr. 1589). Gusmaro Rivera did not confirm this claim. He instead claimed that he, himself, asked for his own card back that Monday or Tuesday (about 3 or 4 days after he filled out his card on October 29). Gusmaro Rivera, like Martin Rivera, also claimed that he was told "there were only a few people left to sign the cards." (1473, 1475–1476, 1498–1499.) On rebuttal, Mussman credibly testified that no one at the October 29 meeting said that only a few employees were left to sign cards and that Gusmaro Rivera never asked for his card back or said he did not want the Union anymore (Tr. 1615).

I infer that the two brothers concocted these claims to support the Company's defense. As held in *Gissel*, 305 U.S. at 608:

> We . . . accept the observation that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of § 8(a)(1).

Gusmaro Rivera's brother Martin Rivera was sitting near him at the union meeting on October 29 when he filled out his card (G.C. Exh. 8), after Union Organizer Segura told him he should sign because "there were more benefits" (with the Union). When doing so, however, Gusmaro Rivera indicated his reluctance to going further than expressing his desire to be represented by the Union. Instead of checking the yes box, indicating that he would serve on committee (as his brother had done the day before), he gave no phone number and gave the wrong address on the card. Upon questioning by company counsel at the trial, he answered no, he did not want anyone from the Union phoning him and no, he did not want anyone from the union visiting him. Although he signed the card only after "Print Name" and not after "Signature," he demonstrated by his actions that he was authorizing the Union to represent him by filling out and signing the card, in the presence of the other employees who were present, and by giving it to the Un-

ion. I discredit as an afterthought his claim that he did not want the Union to represent him. (Tr. 430–434, 450–451, 598–599, 620–621, 668, 1496, 1522–1523, 1532.)

As Mussman credibly testified (Tr. 1615, 1631–1632), sometime the following week (after Monday, when she was making house calls elsewhere, and therefore sometime after the Company, through the setup men, was threatening reprisals for supporting the Union), Gusmaro Rivera told her (outside the plant) to

> "Forget about me." And I asked him why, and he said, "Because I am going to Mexico on an emergency with my honey."
>
> . . . .
>
> Q. BY [Company Counsel] MR. SAMSON: Did you take his comment to mean that he did not want to be involved in the union anymore?
>
> A. I took his comment to mean that he didn't want me to have anything to do with him anymore. . . . I was a representative of the union and he told me he didn't want me to have anything to do with him anymore.

Because, as Mussman credibly testified, Gusmaro Rivera neither asked for his card back nor stated that he no longer wanted the Union to represent him, I find it unnecessary to consider whether Rivera's conduct that week was induced by the Company's unlawful antiunion campaign.

Accordingly I find that all 18 of the authorization cards were valid cards.

2. Appropriate bargaining unit

*a. Undisputed 33 employees in unit*

The complaint alleges the following appropriate unit:

> All full-time and regular part-time production and maintenance employees, employed by Masterform Tool Company, Cylinder Components, Inc., and RRP Enterprises, Inc. at their facility in Franklin Park, Illinois, but excluding office clerical employees, guards, and supervisors as defined in the Act.

There were 37 employees on the payroll, including 2 salaried employees (tool sharpener Thaddeus Beres and over-the-road driver Barney Grogan) and 2 alleged supervisors (setup men Guadalupe Zapata and Feliciano Rodriguez).

It is undisputed that if the 2 salaried employees and 2 alleged supervisors were not included, there were 33 employees in an appropriate unit on October 29, 1993 (when, as found, the Union had obtained 18 valid authorization cards).

*b. Employees in dispute*

(1) Thaddeus Beres and Barney Grogan

The General Counsel and the Union contend that these salaried employees did not share a community of interest with the unit employees.

*Thaddeus Beres* was a highly skilled craftsman who worked alone in a separate maintenance and tooling area (Tr. 806–807; R. Exhs. 29, 45–46). He had no contact with the shop employees, except when one of the setup men instructed a broach operator to take a broach cutter to him for sharpening (Tr. 171–172, 189, 271, 345, 391, 509, 950).

In the period before the November layoffs, Beres not only sharpened cutters and chamfers used on the broach machines, but designed and created parts for the machines and retrofitted tools and fixtures. He used his own tools and also the Company's broach and chamfer sharpening machines, a milling machine, lathe, and other machines, utilizing skills in his work not possessed by any other employee. In his absence, the vice president performed the tool-sharpening part of his work. He worked different hours during the week than the shop employees and did not work on Saturdays, as the shop employees often did. (Tr. 20–21, 59–62, 947–953, 1068–1071, 1155.)

Beres and the over-the-road driver were the only employees on salary. His $60,000 annual salary was much greater compensation than any of the nonsupervisory hourly employees, including the senior packing and shipping employee, Juan Salcedo, who served as expediter and was paid $13.20 an hour. (Tr. 733, 827; G.C. Exh. 29.) To the extent that Beres was supervised at all, he was supervised by Perales, who before becoming vice president had understudied him full time for 3 or 4 years, sharpening tools and designing broach machines, but who admittedly did not learn all his skills (Tr. 1057–1059). Beres' benefits were the same as those of the officials, office employees, and other employees. (Tr. 35–37, 953.)

I note that before the trial the Company did not consider Beres to be one of the shop employees. His name was omitted from the list of "Masterform Shop Employees as of 11/5/93," which was attached to its December 9 statement of position (G.C. Exh 28 p. 9). The only other employees omitted from the list were the over-the-road driver and two CCI employees, Eugenio Garcia and Martin Rivera (Tr. 1025, 1028).

I find that the job duties and conditions of employment of this salaried tool sharpener varied so sharply from those of the production and maintenance employees that he did not share a community of interest with them.

*Barney Grogan* was the over-the-road driver who drove an 18-wheel tractor-trailer. He picked up steel bars from the mills and service centers and made deliveries of company products as far away as New Jersey and Alabama. When he was absent, these deliveries were made by outside carriers. He set his own hours of work, which fluctuated widely, and set his own routes. He performed no production work and had no contact with the shop employees, except when loading and unloading his truck. His annual salary was $60,940. When not driving the 18 wheeler, he drove a 6-wheel pickup truck. Packing, shipping, and receiving clerk Gusmaro Rivera, who sometimes also drove the pickup truck in Grogan's absence from the plant, was paid $11 an hour. (Tr. 41–42, 65, 271, 346, 367, 390, 508, 772, 955–960, 1078–1081.)

Grogan was the only employee who was subject to the Commercial Motor Vehicle Carrier Act of 1986, to regular drug testing, and to a regular physical examination, including eye examination. He kept a driver's log and he was the only employee required to have a commercial driver's license. He submitted an expense report for reimbursement. He was supervised, if at all, by Perales. (Tr. 958, 1074–1078, 1156–1157, 1461–1462, 1469.)

Having considered the factors for evaluating whether there is a community of interest shared between truckdrivers and production and maintenance employees, as listed in *E. H. Koester Bakery Co*., 136 NLRB 1006, 1011–1012 (1962), cited by the Company in its brief (at 105–107), I find that the evidence is clear that the interests of this over-the-road truckdriver were obviously dissimilar to those of the production and maintenance employees.

Accordingly, in the absence of a community of interest between the tool sharpener and over-the-road truckdriver and the

production and maintenance employees, I find that these two salaried employees were not in the bargaining unit on October 29, 1995.

(2) Guadalupe Zapata and Feliciano Rodriguez

*(a) Triple wage rate*

Zapata and Feliciano Rodriguez were broach machine setup men on the first shift in separate areas of the shop—in the old area near shipping and receiving and in the new area in the back of the shop. They were the highest paid hourly employees, receiving $18.34 and $15.36 an hour. When one of them was absent, as discussed below, maintenance man Florencio Carrizal took his place performing the setups in that area. Carrizal was paid at a much lower rate, $11.80 an hour. (Tr. 787, 930, 1023, 1359, 1382, 1432; G.C. Exhs. 28 p. 9, 29; R. Exhs. 29, 79.)

The setup men's hourly wage rates were more than triple the $4.81 average wage rate of the nine first-shift broach operators with whom they worked. This average included the $5.32 wage paid Severiano Grimaldi, who had remained on that starting job over 4 years (since June 6, 1989), running the large 15-ton broach machine. The remaining eight broach operators were being paid from $4.25 to $4.95 an hour. (Tr. 1023; G.C. Exhs. 28 p. 9, 29.)

The junior saw operator Miguel Pimentel (working on the saws located near the eight broach machines in the old area where Zapata worked) was paid $4.95 an hour. Excluding the senior grinder operator Savino Rodriguez, who was hired January 3, 1978, and was being paid $9.50 and hour, each of the four first-shift grinder operators working on the three grinders (one located in the old area and two in the new) was paid $5.20 an hour. These four junior grinder operators included grinder operator/helper Marcial Armendariz and grinder operator/Mazak operator Juan Cardenas. (G.C. Exhs. 28 p. 9, 29; R. Exh. 29.)

There are great conflicts in the evidence concerning why the setup men were being paid triple the wage rate of the broach operators with whom they worked.

On the one hand, the evidence indicates that Zapata and Feliciano Rodriguez were much more than mere setup men whose "only duties," according to President Pippin (Tr. 792), were "to set up the broach machines and inspect [the precision-cut blocks] and load the [broach] machines with the lift trucks." As discussed below, the evidence indicates that they were shop supervisors over both the broach operators and the junior grinder and saw operators. Furthermore, for years before the trial, Masterform had acknowledged that the hourly setup position was supervisory.

On the other hand the Company, recognizing that "the setup men receive higher pay," contends in its brief (at 17, 50), first, "they are the *only two employees* who perform setup work on a full-time basis for the Company and *who have the skills to do so*" (Tr. 837) (emphasis added).

The second part of this contention, that the two setup men are the only two employees "who have the skills to do" the setup work, appears to be misleading. On the cited page of the transcript, President Pippin answered the following question asked by a company counsel:

> Q. [BY MR. PANCOTTINE] Now, did Mr. Zapata and Mr. Rodriguez *always do setups*, perform the setup function for the company?
>
> A. Yes they do. [Emphasis added.]

Pippin was answering that yes, they "always do setups"—not that they always do *all* the setups. Vice President later admitted (Tr. 1023) that Florencio Carrizal (the maintenance man who was paid $11.80 an hour) "can make setups for us." Likewise, Feliciano Rodriguez acknowledged (Tr. 1382) that "Sometimes [Carrizal] does setup also."

Because Florencio Carrizal was the only employee qualified to replace a setup man, I infer that when Zapata was last absent (presumably on vacation) during the week ending May 9, Carrizal replaced him. Both Carrizal and Feliciano Rodriguez worked 47.5 hours that week. Carrizal's $11.80 wage rate was 35 percent below Zapata's $18.34 wage rate. (Tr. 1023, 1382; G.C. Exhs. 28 p. 9, 29; R. Exhs. 29, 79.)

Second, the Company attempts to justify its high wage rates for the setup men by contending (Br. at 17) that "At the time of the events in question. . . . [Zapata and Feliciano Rodriguez] have both been in the Company's employ for over 20 years" and further contending (Br. at 50) "the evidence is also clear that outside of [tool sharpener] Beres, Zapata and Rodriguez are the two most senior employees of the Company." I find the facts to be otherwise.

During the trial a tabulation of hiring dates, wage rates, and tenure of the employees was made from the company records. The tabulation, purported to contain the hiring dates on the employment applications (Tr. 1601–1602; G.C. Exh. 29), shows that neither Zapata nor Feliciano Rodriguez had been in the Company's employ over 20 years and neither of them was the most senior employee. It shows that Zapata was hired April 21, 1977 (about 16-1/2 years before the layoffs), and Rodriguez was hired October 4, 1976 (about 17 years before).

The tabulation further shows that there were four hourly employees who were more senior than either of them and that although these four employees had more seniority, their $11.27 average wage rate was 38 percent *below* Zapata's $18.34 rate and 26 percent *below* Feliciano Rodriguez' $15.36 rate. Saw operator Alfredo Ovalle (hired February 12, 1974) was paid $12.24. Crane and saw operator Abdiel Gallardo (hired June 10, 1975) was paid $12.40. Second-shift grinder operator Francisco Segura (hired April 19, 1976) was paid $11.03. Mazak operator Ginora Carrizal (hired April 22, 1976) was paid $9.41. (G.C. Exhs. 28 p. 9, 29.)

By the time the tabulation was offered in evidence (Tr. 1601–1602), Zapata had testified as a defense witness on November 9, 1994 (Tr. 1428) that he had worked there 22 years. Feliciano Rodriguez testified earlier that same day (Tr. 1355) that he trained as a setup man about 2-1/2 years (during which time he also drove a Jeep lift truck and operated broach machines) and had been a setup man about 20 years (a total of over 22 years). As found, by their demeanor on the stand both Zapata and Rodriguez appeared willing to give any testimony that might help the Company's cause.

I note that if it were true that both Zapata and Feliciano Rodriguez had been employed 22 years before November 9, 1994, when they testified at the trial (that is, employed in 1972 instead of April 21, 1977, and October 4, 1976, as the company records show), they would have been senior to Alfredo Ovalle, the most senior person on the list of "Masterform Shop Employees as of 11/5/93" (G.C. Exh. 28 p. 9). Like the tabulation, that pretrial list (attached to the Company's December 9, 1993 statement of position), showed Ovalle's hiring date to be February 21, 1974. The same pretrial list showed Zapata's hiring date was over 3 years' later on April 21, 1977 (the same as the

tabulation), and Rodriguez' hiring date was January 3, 1978 (later than the October 4, 1976 date on the tabulation).

In addition to the above testimony by Zapata and Rodriguez, the Company had also introduced testimony by President Pippin concerning when they were hired. He claimed (Tr. 841) that when he started with the Company in 1974, Zapata was already employed (contrary to Zapata's April 21, 1977 hiring date on both the pretrial list and the tabulation prepared during the trial) and "I believe" that Rodriguez was also. As indicated above, Pippin did not impress me as being a candid witness. He gave other discredited testimony, including his denial that he had "any knowledge" of the union organizing before the November 8 layoffs.

Although not disputing any of the other information on the tabulation (G.C. Exh. 29), the Company would not agree to the accuracy of the starting dates (Tr. 1602):

> MR. SAMSON: . . . . I will only agree with the fact that [the exhibit] accurately reflects what is on the file covers. As for whatever the testimony was, I would propose *for my purposes* that that would be more accurate. I would agree that these are accurate representations of what are on the file covers. [Emphasis added.]

Even though the trial did not conclude until the following day, the Company offered no evidence that the employment applications or other contents of the files contained any different hiring dates than those stated on the file covers. I do not discern any reason for not relying on the accuracy of the Company's written records, as shown on the employee file covers, rather than on the purported memory of witnesses who gave other discredited testimony at the trial.

I reject these stated explanations for paying Zapata and Feliciano Rodriguez wages that were triple the wages of the broach operators with whom they worked. Their wage rates were substantially higher than even the $13.20 rate being paid Juan Salcedo (hired May 18, 1981), the packing and shipping employee who was serving as the expediter of all orders (Tr. 826–827; G.C. Exhs. 28 p. 9, 29).

I find it obvious that the Company was faced with a dilemma at the trial. It was trying to justify the payment of the high $18.34 and $15.36 hourly wage rates to the broach machine setup men when an $11-an-hour maintenance man could, and did on occasion, perform the same work. Yet, it could not admit giving the setup men supervisory authority that would justify the high wage rates, because the Company's main goal was to escape responsibility for the antiunion campaign that the setup employees conducted (as found, on the Company's behalf).

The Company's resolution of the dilemma was to present evidence at the trial to support the above-rejected explanations for paying the high wages and *not* to admit that Zapata and Feliciano Rodriguez were even leadmen. Upon questioning by a company counsel, President Pippin positively denied that they had "any authority over any other employee," then attempted to limit the denial (Tr. 841):

> Q. [BY MR. PANCOTTINE] Do you consider either Mr. Zapata or Mr. Rodriguez to be supervisors or foremen?
>
> A. No, I don't.
>
> Q. Why not?
>
> A. They don't have *any authority over any other employee* out in back.
>
> Q. What do you mean by authority?
>
> A. They were never given any permission by myself or Richard [Perales] to discipline or hire or fire anybody out in back. [Emphasis added.]

Earlier Pippin omitted any mention of the setup men's responsibility for assigning and directing broach operators when asked what broach operators do during setups that do not require sharpening the cutters. He testified (Tr. 839):

> A. Usually [the broach operators] will pull the chips on the machine first. They can assist in the setup by helping them change the center block on the machine, getting the other spacers. If it is going to be a longer setup, *they will go run another machine* that has already been set up. [Emphasis added.]

This testimony suggests that the broach operators were on their own, performing the work without any assignment or direction from the setup men.

Despite the instructions required for the broach operators to learn to operate each of the different sized one- and two-operator broach machines, Pippin claimed on direct examination (Tr. 772, 779, 834):

> A. To operate a broach machine, *once you learn to run a broach machine, you can run any of the broach machines*. [Emphasis added.]
>
> . . . .
>
> Q. So would it be a correct characterization that the operator simply feeds the machine?
>
> A. Yes.
>
> . . . .
>
> Q. Do new employees receive training on how to operate each of the individual broach machines you have?
>
> A. No. They are shown one machine and from there they can basically run any of them. They are almost all identical.

Again he appeared to be less than candid. I discredit Pippin's claim that "once you learn to run a broach machine, you can run any of the broach machines."

I find that the Company paid the two setup men the high wages—triple the wages it paid the broach operators and junior saw operator, about triple the $5.20 wages it paid four junior grinder operators, and substantially greater than it paid other senior shop employees—because the setup men possessed more authority and responsibilities than the Company would admit at the trial.

*(b) Acknowledged supervisory status*

For years, Masterform had acknowledged that the position held by these hourly setup men was supervisory.

In 1989, President Larry Pippin's sister, Lynn Pippin, as Masterform's vice president, certified on a "Request for Verification of Employment," an official Federal Government document (also signed by Guadalupe Zapata), that Zapata's present position was "Setup Man/Supervisor." (The form had the warning about Federal statutes providing severe penalties for intentional misrepresentation, etc.) Two years earlier, over Vice President Lynn Pippin's signature, the Company stated in a letter "To Whom It May Concern" that Zapata's "position with the company is Supervisor" and that the "information is provided from our company payroll records." (G.C. Exhs. 26B, 26C; Tr. 814.)

I discredit Lynn Pippin's claim at the trial (Tr. 1264) that when she stated in 1989 that Zapata's present position was "Setup Man/Supervisor," she was merely trying to "make him look as good as possible for the loan for his house." I note that during the same period of time when she was vice president, she accurately verified the positions of Ginoro Carrizal as machine operator, Abdiel Gallardo as crane operator, Martin Guerra as machine operator, Francisco Leon as machine operator, and Alfredo Ovalle as machine operator. (G.C. Exh. 34.)

As found above, Feliciano Rodriguez (in effect acknowledging his supervisory status) told Union Organizer Mussman on November 3 that he could not "be a part" of the Union because he was "part of management."

*(c) Authority over broach operators*

The Company followed the policy of exclusively hiring—at the $4.25 minimum wage to fill vacancies in the starting job of broach operator—untrained Mexican immigrants who were referred by its current shop employees, all of whom were of Mexican origin (Tr. 52, 61, 830–831, 833, 835, 949, 1234, 1362, 1441, 1620–1621). The only bilingual employees in the shop at the time of the layoffs were shipping employee Martin Rivera (paid $6.82 an hour), maintenance man Florencio Carrizal, and crane and saw operator Abdiel Gallardo. One of them would assist in filling out the employment application and the immigration and other papers. (Tr. 197, 281, 348, 516, 556, 833, 844, 1261, 1562; G.C. Exh. 28 p. 9; R. Exhs. 9–12.)

President Larry Pippin and Vice President Richard Perales were the two officials in charge of operating the plant. Perales spoke Spanish, but Pippin did not. (Tr. 11, 44–45, 51–52, 835, 845, 868, 918, 924, 933, 973, 1017, 1031.) As discussed below, neither of them directly supervised the broach operators and the junior grinder and saw operators. The two Spanish-speaking setup men, Zapata and Feliciano Rodriguez, provided the new employees virtually their sole contact with the management.

I find that the General Counsel's six employee witnesses (all of whom were laid off on November 8 and all of whom, except Cocoma, were later reinstated) gave a more accurate picture of the operation of the shop than the two officials and the two setup men.

Three of these witnesses were recently hired broach operators, Salvador Cocoma (hired October 11), Onecimo Castillo (hired August 16), and Porfirio Longoria (hired June 30). One was a saw operator, Miguel Pimentel (hired July 19). The other two were more senior employees working as grinder operators, Marcial Armendariz (hired May 1, 1990) and Francisco Rodriguez (hired April 9, 1990). (G.C. Exhs. 28 p. 9, 29.)

Although never told by the officials, all of these witnesses considered the setup men to be their supervisors (Tr. 75–76, 78, 99, 167, 253, 272, 283, 326, 328, 371, 375, 511). Cocoma (who was hired less than a month before his layoff and was working in Zapata's area) was told by other employees, including broach operator Longoria (who referred him to the job and who had been working there since June 30) that Zapata was his supervisor (Tr. 186, 209–210). On November 3, when the union organizers went to Savino Rodriguez' home and Feliciano Rodriguez came out, grinder operator Armendariz told Union Organizer Mussman that Feliciano Rodriguez was a supervisor (Tr. 535).

The setup men were the only ones who assigned the broach operators to work on the one- and two-operator broach machines, directed their work, and trained them on different sized broach machines to which the setup men assigned them. Throughout the day the setup men inspected their work, checking to see if the precision-cut blocks met the tolerance specification. They ordered broach operators to redo unsatisfactory work. They were contacted by the broach operators when something was wrong with the broach machines. (Tr. 103–104, 149, 168, 205, 255, 258, 314, 322, 327, 392–393, 488–489, 517–518, 553, 805.)

Although the broach operators could not verify the close tolerances required for the precision-cut blocks, they were expected to be alert and to notice such problems as "a chip or something stuck behind" the block, a "big chunk torn off a corner" of a block, or "a nick" on the broach cutter that puts "a big line in the block." The operators would of course work under the setup men's directions when, as admitted by President Pippin, they assisted in making setups. (Tr. 787–788, 839, 917, 1068.) Feliciano Rodriguez acknowledged only that while a broach operator is waiting for a setup to be finished, "If I would need something I would ask them for a tool that I need" (Tr. 1393).

The broach operator usually (but not always, Tr. 396) reported each day to the setup man, who would assign the operator to a broach machine in his area or send him to the other setup man to work in the other area. When an operator finished running an order or when a new setup was required, the setup man reassigned him to another broach machine or had him assist in making the new setup. (Tr. 73, 168–169, 188, 208–209, 254–255, 282, 326–327, 839.)

I note that Feliciano Rodriguez acknowledged (Tr. 1399–1400) that each morning, he told the broach operators "which machines to work on" in his area. Zapata, however, denied (Tr. 1457) telling employees where to work, asserting that they knew where they worked the day before and "they go there." To the contrary, broach operator Cocoma credibly testified that everyday when he arrived in the morning, he would go to Zapata, who would assign him a job or send him to Rodriguez to be assigned.

The setup men "spot inspect all day long," taking blocks to the inspection room and using an indicator "to make sure the tolerances are still holding." If the tolerances were not being held, if a broach cutter had become dull, or if a broach operator reported a faulty cutter, the setup man would have to make a new setup. If necessary, he had the cutters sharpened or he replaced a faulty cutter. (Tr. 787–788, 791, 809–811, 1068, 1399–1400.)

Zapata testified (Tr. 1430) that he inspected about 30 to 50 blocks from the broach machines a day in about 2 or 3 hours (averaging between 3 and 4 minutes for each inspection). I discredit Pippin's claim (Tr. 840) that Zapata spends a "good" 3 or 4 hours a day in the inspection room and Feliciano Rodriguez' claim (Tr. 1358) that he spent about 5 hours a day in there (even though he had only six broach machines in his area, as compared to the eight in Zapata's area).

It took the setup men a short time to give the basic instructions on how to operate each broach machine, but it took several months under the setup men's directions for the new, untrained immigrant employees to develop satisfactory work habits and efficiency to achieve the desired productivity. By that time the Company would know whether the broach operator was a good employee. It sought "Someone who pays attention to detail, puts the blocks in the order that they are supposed to go in, doesn't make double work for himself," properly stack-

ing the blocks "on the skid right the first time" instead of first spreading them out, and "doesn't kill time." It could also determine by that time "if they seem pretty sharp to read measuring instruments." (Tr. 72–74, 237, 834, 918, 1030, 1123).

I discredit Feliciano Rodriguez' claims (1) that broach operators can learn the broach machines in 5 minutes, (2) that in a week they can be running it the same as an operator who has operated a broach machine for a number of years, (3) that when choosing between two employees to run a broach machine, it did not matter which broach operator was available "because they all know how to run the machines," and (4) that the broach operator who was closest, "I would say run that machine" (Tr. 1394–1395).

I note that at one point Rodriguez claimed that "the least amount of time it would take" to set up a broach machine was 2-1/2 hours, but then changed his testimony and acknowledged that he could make some setups in 20 to 30 minutes (Tr. 1391).

In addition to assigning, training, and directing the work of broach operators, the setup men performed other duties for the Company involving these and other employees.

When employees forgot to clock in or out, the setup men wrote in the time and initialed the timecards, ensuring proper payment for the work performed without the employee having to report the error to the office. They exercised this authority not only for the broach operators but *also for grinder and saw operators*. (Tr. 82, 244–245, 330–331, 376–377, 497, 527–528, 1359, 1431–1432.)

The setup men have used their independent judgment in giving employees immediate permission to leave work early. Both Zapata and Feliciano Rodriguez gave *grinder operator* Francisco Rodriguez immediate permission. As Francisco Rodriguez credibly testified, "They tell me that I can leave and then they go talk to the office." Zapata has also given *saw operator* Miguel Pimentel immediate permission to leave early. Neither Francisco Rodriguez nor Miguel Pimentel gave an emergency as the reason for requesting the permission. Pimentel told Zapata merely that "I had something to do." (Tr. 80–81, 114–115, 376, 415, 420.)

Using his independent judgment, Zapata treated *grinder operator/helper* Armendariz differently when he would ask for permission to leave work early. As Armendariz credibly testified, "When Perales was there, [Zapata] told me to go and ask Perales or tell Perales that I was going to leave. Sometimes when I don't think he was there, then [Zapata] would tell me it was okay to go." I infer that the reason Zapata treated Armendariz' requests to leave work early differently from the way he treated the requests of other employees was Armendariz' repeated requests to leave early. Armendariz was requesting permission to leave early for "personal reasons," as well as "[p]roblems with the police or when I was sick." (Tr. 496–497, 526–527, 558.)

I discredit Zapata's claim that he never told employees that they could leave work early, that "I would tell them to go to the office" and "ask themselves," and that "If they refused then I would go" (Tr. 1435–1436).

I find that these functions of the setup men, assigning and responsibly directing the work of the broach operators and junior grinding and saw operators, are indicia of supervisory status. The following responsibilities of the setup men tend to further demonstrate that the setup men provided the employees virtually their sole contact with the management.

The setup men relayed—both to the broach operators and to the *grinder and saw operators*—the Company's requests that employees work 2 hours' extra overtime on weekdays or 5 hours of overtime on Saturdays (Tr. 82–83, 259, 287–288, 328–330, 352, 354, 374–375, 396, 399, 493–494). They gave employees their paychecks (Tr. 83). They checked in the office to get errors corrected on employee paychecks (Tr. 83–84, 120–121). They handled employee vacation requests (Tr. 81, 115–116, 149–150).

*(d) Authority over grinder and saw operators*

President Pippin admitted that when Perales receives a telephone order, writes down the order and gives the customer prices and delivery dates, takes a purchase order number, has the order logged onto the computer, checks the printout, and takes it to Juan Salcedo (the packing and shipping employee who served as an expediter), then (Tr. 826–827):

> A. It is Juan Salcedo's job to fill the orders and get them shipped out the door. Juan will tell the crane man what size to load onto the saw. He will tell the saw guy how many he needs of a certain size. *He will tell the setup man what size he needs broached, what size has to go onto the grinder*. He basically follows the order all the way through to try to get it shipped out the door. [Emphasis added.]

Thus, Pippin was admitting that the setup man was concerned not only with production on the broach machines, but also with production on the grinding machines.

The credible evidence reveals that the setup men had responsibilities involving not only grinder production, but also the junior grinder and saw operators. Three General Counsel witnesses (two employed in 1990 and one in 1993) credibly testified that the setup men continued to exercise authority over them after their transfer from the broach machines to the grinding machines and saws.

Grinder operator Francisco Rodriguez (hired in 1990) credibly testified that his uncle, Feliciano Rodriguez, spent about 30 minutes on the first day teaching him how to operate a broach machine and about 15 to 30 minutes on other broach machines. Then for 1 year, "more or less," Feliciano Rodriguez showed him "how to do the work," gave him daily instructions, told him "what to do," and brought "the material that I needed to use." Toward the end of 1992, Feliciano Rodriguez "told me to go help the man that was working" on the grinding machine. After about 3 months, "The [grinder operator] that worked there left and Feliciano told me to run the machine." (Tr. 72–75, 103–104.) This testimony demonstrates that Rodriguez was exercising independent judgment in transferring the employee. The Company did not present evidence that either Pippin or Perales instructed Rodriguez to make these transfers.

When asked who his supervisor was in October (before the layoffs when he was working on the grinder in the old area of the shop near the eight broach machines), Francisco Rodriguez expressed his opinion (Tr. 75–76), naming Zapata. Later when asked who supervises him when he works on Saturdays, he answered (Tr. 78) both Zapata and Feliciano Rodriguez. Having been employed since 1990 and evidently having had more contacts with the officials in those 3 years, he considered President Pippin and Vice President Perales, as well as Zapata and Feliciano Rodriguez, to be his supervisors (Tr. 144).

Grinder operator Marcial Armendariz (hired in 1990) expressed a similar opinion, that both Zapata and Feliciano Rodriguez were supervisors. He testified that he worked more than a year on the broach machines under Rodriguez' supervision and continued under Rodriguez' supervision when Rodriguez "told me to come over and work with them on the grinders" (near the six broach machines in the new area where Rodriguez worked). Armendariz worked on the Blanchard grinder there until May, when he was injured. (Tr. 490–491, 511, 522.) This testimony further demonstrates that Rodriguez was exercising independent judgment in transferring the employee. I discredit Pippin's claim (Tr. 835, 918–919) that only he and Perales make the decision "to move an employee off the broach machine to give them an attempt to learn another machine."

Upon Armendariz' return to work on light duty (with the approval of Marla Pippin, in the absence of Pippin and Perales), Feliciano Rodriguez sent him to Zapata, who assigned him to work in Zapata's area on a small broach machine until he was able to return to the grinding machines. Armendariz then worked on the Mattison grinder in Rodriguez' area as Savino Rodriguez' helper. (Tr. 491–493, 519–520, 523–524, 556–557, 563–564.)

On cross-examination, Armendariz credibly testified (Tr. 520–521) that when he worked on the Mattison grinder, Feliciano Rodriguez "would bring the material" to the grinder on a lift truck. Upon being asked about his testimony "that at that time Mr. Rodriguez was your supervisor," he answered yes and credibly testified (Tr. 521):

> Q. Did anyone tell you that he was your supervisor?
>
> A. No, I don't know if he is my supervisor, but he is the one that brings the material and he is the one that gives the orders and tells us what to do.

As indicated above, Armendariz is the employee who told the Union on November 3 at Savino Rodriguez' home that Feliciano Rodriguez was a supervisor.

Saw operator Miguel Pimentel (who was hired July 19) testified that Feliciano Rodriguez was his supervisor on the broach machines for 1 or 2 months and that Zapata became his supervisor when he was transferred to the saws in Zapata's area. Regarding the circumstances of his transfer so soon after he was hired, he credibly testified that it was his idea when saw operator Fernando Ornelas left (the first week in October) to return to Mexico. He asked Zapata, "If I could work on those machines" and Zapata immediately answered, without checking with anyone (Tr. 372, 395, 415–416), "Yes, it is okay, you can work on them" (showing Zapata's exercise of independent judgment in transferring the employee). Zapata told him a day later that he could stay there, it was okay. He did not know if Zapata had already checked with the office. His wages remained $4.95 an hour. (Tr. 370–373, 394–395, 415–416; G.C. Exhs. 28 p. 9, 29; R. Exh. 79.) I discredit Zapata's denial that he ever moved an employee from the broach machines to any other machines in the shop (Tr. 1435).

Saw operator Alfredo Ovalle taught Miguel Pimentel how to operate the saws, but Pimentel testified that Zapata was still his supervisor (Tr. 371, 394).

This testimony, that Zapata and Feliciano Rodriguez transferred employees and continued to exercise authority over them after they became a grinder or saw operator, further indicate the setup men's supervisory status.

*(e) No direct supervision by officials*

The General Counsel's employee witnesses credibly testified that neither President Pippin nor Vice President Perales directly supervised the broach operators and the junior grinder and saw operators. They saw little of Perales in the shop and less of Pippin. Zapata and Feliciano Rodriguez provided the new employees virtually their sole contact with the management.

Broach operator Onecimo Castillo (hired August 16) saw Perales "very seldom in the factory," only when Perales would come out with papers and give the orders to shipping clerk Juan Salcedo or to Feliciano Rodriguez or Zapata. He saw "Very little" of Pippin, who "would just walk through" the shop. Castillo could not see the entire shop from where he was working. (Tr. 258, 286–287, 306.)

Broach operator Salvador Cocoma (hired October 11) would see Perales once a day, spending about 12 or 15 minutes walking around the production area. He also could not see the entire shop. (Tr. 171, 210.)

From where he worked, broach operator Porfirio Longoria (hired June 30) would see Perales walking through the production area about 3 or 4 times a day, spending about 10 or 15 minutes each time (Tr. 330). He also saw Perales at the Mazak machine (Tr. 353).

Saw operator Miguel Pimentel (hired July 19) saw Perales "walking around" the production area once or twice a day, each time spending 10 or 15 minutes (Tr. 375–376). He testified (Tr. 398) that he sometimes saw Perales working on the Mazak machine and added: "If the machine would break down, he would try to fix it."

The more senior grinder operators credibly confirmed this testimony. Marcial Armendariz (hired in May 1990) testified that Perales would come out and walk around with paper work 2 or 3 times a day (if at all) and would remain sometimes 10 or 15 minutes or go back in. He would talk only to those he handed the paper work and never told Armendariz what work to do. (Tr. 294–296, 511–512.)

Francisco Rodriguez (hired in April 1990) saw Perales 3 or 4 times a day, for 5 or 10 minutes at a time, "just walk[ing] through looking at the workers." He credibly testified that during his 3-1/2 years of employment there, he never saw Perales "talk to employees when he walked through the production area." (Tr. 79–80.)

In sharp contrast to this credited testimony, the Company contends in its brief (at 48) that President Pippin and Vice President Perales "are in the shop on a *continuous basis throughout the day* [emphasis added]."

I find that this contention is based on fabricated testimony.

Pippin claimed (Tr. 845) that he was "always" in the shop 3 hours a day or longer and "all day long if necessary." Perales first claimed (Tr. 51) that he was in the shop 4 or 5 hours a day. I note that when Perales made this claim, while testifying as the first witness, he evidently anticipated contrary testimony because he added (Tr. 52): "Sometimes they don't even see me and that is just because I am in and out so often I guess." Later in the trial, after much contrary testimony was introduced, Perales changed his testimony and claimed as a defense witness (Tr. 965) that he was in the shop 3 or 4 hours a day.

In an effort to explain how he would spend 3 or more hours a day in the shop, Pippin testified (Tr. 760, 919) as follows—not contending that he was directly supervising the work of the Spanish-speaking employees:

Q. What type of duties do you have in the shop as president, if any?

A. Oversee production, make sure people are wearing their safety glasses. Just generally *walk through and make sure things are going smoothly*, follow up orders.

. . . .

A. I still performed maintenance on the machines. I go out there and *just walk through* and see if orders are going out the door. [Emphasis added.]

Q. Anything else?

A. If there was a problem I would go out there, bad parts or I could be out there for any numerous reasons.

I do not doubt, as Pippin testified (Tr. 845), that (on occasion) he could spend "all day long if necessary" in the shop when there was a machine breakdown or trouble getting out an order, but I discredit as another fabrication his claim that he always spent 3 hours or more in the shop.

Perales testified (Tr. 50) that he was at his desk taking orders about 4 or 5 hours a day.

He also spent considerable time in the office dealing with the steel mills and aluminum extruders, which have long lead time for deliveries, endeavoring to link up large purchases and anticipated orders to avoid paying the higher prices for steel and aluminum bars in smaller quantities at service centers (Tr. 962–964).

Regarding his work in the shop, Perales detailed his handling of orders and his work with the Mazak machine and testified (Tr. 965) that if a customer needs to know right away about an order, he would take his portable telephone into the shop and check with Salcedo or Feliciano Rodriguez to see where the order was. (This testimony illustrates the important production role filled by Rodriguez, a setup man who made a daily report of broach production and assisted in the grinder production, (Tr. 521, 787).) Perales then testified (Tr. 965–966):

Q. And are there any other things that you would do out in the shop, other than what you just described with respect to orders?

A. I try to do everything out in the shop from just saying hi to some employees to making sure things are going right in the shop.

. . . .

Q. What type of supervisory issues?

A. From safety glasses, safety shoes, fighting. You know, people not getting along with each other.

Perales' only reference to direct supervision of the work of shop employees was when he was asked if he had "any occasion to interact with any broach operators." He claimed (Tr. 965), without giving any examples or details, that "[i]f I didn't like what they were doing or how they were doing it, I would tell them I would like to see them do it this way. Just nonchalant as paying my respect to some of the older employees, say hi to them."

If in fact Perales had ever given such a directive to a broach operator, instead of going through the setup man who assigned the operator and directed his work, the employee witnesses had never witnessed it. I discredit, as fabrications, his claim that he did so and his claim that he spent 4 or 5 hours, or 3 or 4 hours, in the shop daily.

I therefore reject the Company's contention that Pippin and Perales were in the shop on a *continuous basis throughout the day*.

*(f) Shop supervisors*

The Spanish-speaking setup men, Guadalupe Zapata and Feliciano Rodriguez, were the sole management representatives in the shop, training, assigning, and directing the work of the untrained Mexican-immigrant employees whom the Company exclusively hired in the starting job of broach operator. Both the broach operators and the junior grinding and saw operators (who also were Spanish-speaking employees of Mexican origin) looked to the setup men as their supervisors.

President Pippin (who did not speak Spanish) and Vice President Perales (who was fluent in Spanish) spent little time in the shop and did not directly supervise the work of the broach operators or the junior grinder and saw operators.

As found, Zapata's and Rodriguez' $18.34 and $15.36 wage rates were triple the $4.81 average wage rate of the broach operators working with them on the first shift, triple the $4.95 rate of the junior saw operator, and about triple the $5.20 rate of the four junior grinder operators. Their wage rates were the highest hourly wages in the shop, including the $11.27 average wage rate of the four most senior shop employees and the $13.20 rate paid the packing and shipping employee who served as the expediter of all orders. The maintenance employee who did setups on occasion was paid $11.80 an hour.

Zapata and Rodriguez were responsible for the production on the 14 broach machines. They alone selected the nine broach operators to work on the various broach machines to get out the production, assigning an employee already trained to work on the particular sized machine or selecting and assigning an untrained operator and showing him how to do the work. When an operator finished running an order or when a new setup was required, the setup man reassigned him to another broach machine or had him assist in making the new setup. They ordered broach operators to redo unsatisfactory work. They were contacted by the operators if something was wrong with the broach machines.

The company officials delegated to Zapata and Rodriguez the duty of responsibly directing the daily work of the broach operators. The two setup men, in their separate areas, inspected the work of these untrained immigrants throughout the day and gave them the necessary directions for developing satisfactory work habits and efficiency to achieve the desired productivity. Then, when a vacancy occurred on a grinding machine or the saws, after the broach operator became a good employee and appeared to be "pretty sharp to read measuring instruments," the setup man would permit him to transfer.

In addition, Zapata and Rodriguez continued to exercise their authority over employees after transferring them to work on the grinding machines or saws.

Zapata and Rodriguez demonstrated the exercise of their independent judgment in further responsibly directing the broach operators as well as the junior grinder and saw operators by giving the employees permission to leave work early and by writing in the time and initialing the timecards for employees who forgot to clock in or out. They also performed other duties, consistent with their role as supervisors in the shop. They checked in the office to get errors corrected on employee paychecks, handled employee vacation requests, relayed company requests that employees work extra overtime and on Saturdays, and handed out the paychecks.

After weighing all the evidence, I find that the hourly setup men Guadalupe Zapata and Feliciano Rodriguez were in fact, and were regarded by the employees as, shop supervisors. I find

that they used independent judgment in exercising their authority, in the interest of management, in assigning, transferring, and responsibly directing broach operators and in responsibly directing junior grinder and saw operators.

I therefore find that Guadalupe Zapata and Feliciano Rodriguez were supervisors within the meaning of Section 2(11) of the Act.

Accordingly I find that they—as well as salaried employees Thaddeus Beres and Barney Grogan—were not included, leaving 33 production and maintenance employees in the bargaining unit.

As indicated, I further find that the Company is responsible for the unlawful conduct of Zapata and Rodriguez in carrying out the Company's antiunion campaign during the week before the layoffs, threatening employees with layoff or termination and relaying President Larry Pippin's threat to close or move the plant if the employees supported the Union.

### *E. Required Remedy*

#### 1. Contentions and controlling standards

The General Counsel contends in its brief (at 1, 44, 47) that the November 8 layoff of the seven members of the employee organizing committee, fulfilling its layoff threat for engaging in the union activity, decimated the support of the Union, "stopping the union organizing in its tracks" because of employee fear of the same fate. This "undermined the Union's majority position and rendering it impossible for employees to exercise their free choice in an election, thus requiring appropriate relief including a *Gissel* bargaining order."

The Company contends (Br. at 121) that even if the allegations of unfair labor practices were true, "the facts of this case do not warrant the imposition of a remedial bargaining order." It particularly asserts (Br. at 122, 125) that "if the November 8 layoff is deemed violative of the Act there are mitigating circumstances that alleviate the impact of the violation. Foremost in this analysis is the fact that all of the employees who were laid off with the exception of Salvador Cocoma returned to work. . . . The Board's traditional remedies will more than adequately serve to protect the employees' rights and ensure a fair and free election."

It is well established that a Board secret-ballot election is the preferred remedy.

In deciding whether a bargaining order is required over this preferred remedy, the Supreme Court has established the standards. For a second category case such as this, in which a showing has been made "that at one point the union had a majority," the Court ruled in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 614–615 (1969), that

> of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employee misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the *extensiveness* of an employer's unfair practices in terms of their *past effect on election conditions* and the *likelihood of their recurrence* in the future. If the Board finds that the *possibility of erasing the effects* of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, *is slight* and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue. [Emphasis added.]

As held by the Seventh Circuit Court of Appeals in *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1159 (1990), recently cited in *America's Best Quality Coating Co. v. NLRB*, 44 F.3d 516, 521–522 (7th Cir. 1995):

> While the Board's power in fashioning remedies is a broad discretionary one, we have held that bargaining orders, due to their "drastic consequence of forcing union representation on employees and forcing the employer to bargain, are not the favored remedy." [*Justak Bros. v. NLRB,* 664 F.2d 1074, 1081 (7th Cir. 1981).] Thus, "[t]o grant a bargaining order in any instance other than in the last resort (when other traditional remedies are available) constitutes an abuse of the Board's discretion." *Impact Industries, Inc. v. NLRB*, 847 F.2d 379, 383 (7th Cir. 1988). Accordingly, we have required the Board to "give specific reasons that justify its use of the bargaining order remedy." Id.; *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1118 (7th Cir. 1973). In the absence of an "express articulated consideration of the propriety of a bargaining order this court will presume that an election is the preferred means for determining representative status." *NLRB v. Berger Transfer & Storage Co*., 678 F.2d 679, 694 (7th Cir. 1982). Most importantly for our purposes, we held in *Peerless of America*, [484 F.2d 1108, 1118 (7th Cir. 1973) (emphasis added)] that the Board must make:
>
> > "[s]pecific findings" as to the immediate and residual impact of unfair labor practices on the election process . . . and a *detailed analysis assessing the possibility of holding a fair election* in terms of any continuing effect of misconduct . . . *and the potential effect of ordinary remedies.*

Specific findings and an analysis follow.

#### 2. Specific findings and analysis

*Immediate Impact on Election Process*. Between October 15 and 29, before the Company became aware of the union organizing, a majority of 18 of the 33 bargaining unit employees signed valid union authorization cards. Those were the last cards signed. At the beginning of the next week of November 1, after being alerted to the organizing effort on Saturday, October 30, the Company engaged in an unlawful antiunion campaign through its two shop supervisors (setup men Guadalupe Zapata and Feliciano Rodriguez).

Both shop supervisors coercively interrogated individual employees about the union activity and employee support of the Union. They threatened the employees with layoff or termination and relayed President Pippin's threat to close or move the plant if the employees supported the Union.

On Wednesday, November 3, Shop Supervisor Rodriguez directly informed Union Organizers Mussman and Segura and four members of the employee organizing committee that in a meeting earlier that week in the office, President Pippin had said that if the employees joined the Union, he would close or move the plant. Rodriguez added that Pippin was very rich, that the Company was just like a toy, and that he could easily move the plant. Rodriguez also said he knew there were back orders and that Vice President Perales had mentioned them to Pippin, but Pippin said he did not care.

The effects of the threats to lay off or terminate employees and to close or move the plant were immediate. Fearing that the threats would decimate the employee support, the two union organizers and all seven members of the employee organizing

committee decided to meet outside the plant on the lunch break on Thursday, November 4, "to bring together as many employees as possible to then go into the office to speak with management about recognizing the Union." Evidently because of the shop supervisors' threats, none of the 11 other union supporters in the plant joined the organizers, who then decided against orally requesting recognition of the Union. The Union had already filed a petition for an election the day before and had sent the Company a postalgram, complaining about the threatening of union supporters.

On Tuesday, November 2 (soon after the Company's antiunion campaign began), the Company decided to start selecting employees for layoff. On Thursday, November 4 (when the lunchtime meeting outside the plant placed the Company on notice that the seven employees were leading the organizing drive), the Company decided to eliminate the second shift, reassign the six second-shift employees to the first shift, and lay off all seven union organizers from the first shift.

The Company laid off these seven members of the employee organizing committed on Monday, November 8, supposedly for "lack of work," telling them they would be recalled as soon as possible.

It was obvious to the remaining employees that there was no shortage of work and that the layoffs were a fulfillment of the layoff threats. The next day, November 9, the first-shift working hours were increased from 9-1/2 to 10-1/2 hours a day. On November 15, because of a shortage of grinder production (despite the lengthened workday), the Company recalled one of the three laid-off grinder operators. During the next 5 weeks (excluding Thanksgiving week), the Company increased the overtime to a record high, 14.7 hours a week, and assigned a high percentage of the employees to work from 16 to 17-1/2 hours of overtime.

The threats and the layoff of all seven members of the employee organizing committee destroyed the union majority and stopped the organizing. The unfair labor practice charge blocked the holding of an election, which the Union obviously could no longer win.

*Residual Impact on Election Process.* On November 30, while the Company was having the employees work an unprecedented amount of overtime instead of recalling the remaining six laid-off employees, the Company demonstrated to the employees its continuing concern about their supporting the Union. It posted a notice, in English and Spanish, notifying the employees of the November 3 filing of the election petition and stating, in part (R. Exh. 78):

> You do have the right to revoke your authorization card and can do so by sending a letter to the union telling it that you do not want to have the union represent you, and that you withdraw any authorization you may have signed. Such a letter along with a pre-addressed envelope can be found below this notice. . . .
> . . . if you have changed your mind and no longer want the union to represent you, you have every right to withdraw your card right now.

After letters were signed and dated (Tr. 698–699, 1592–1595; R. Exhs. 76, 77), an employee took them to the post office on company time and mailed them (Tr. 501–511).

I find that in the context of the record amount of overtime the Company was assigning while keeping the employee organizers off the payroll, the Company was acting to further impress on the employees its punishment of the union supporters, while paying the remaining employees the overtime rate for extra work.

The Company further impressed on the employees this discriminatory motivation by continuing to assign the record amount of overtime for the next 3 weeks, before the Christmas season, without recalling any other laid-off employee. After the Christmas season, the Company demonstrated that it was postponing the promised recall of the remaining six employees as long as possible. It recalled only one of them on January 10, 1994, when most of the employees were working 17-1/2 hours of overtime that week. It recalled only one other employee during the week ending January 23. That week it assigned most of the employees 17 or more overtime hours. It recalled no one the following week ending January 31, even though it was assigning most of the employees 17 to 19-1/2 hours of overtime.

The Company waited until February 1, 1994, to decide to reinstate the second shift and recall the remaining four employees.

By this conduct, the Company was impressing on the employees what could happen to them individually if they supported another union organizing campaign. Moreover, the employees were faced as a group with President Pippin's threat before the layoffs to close or move the plant. If this threat were carried out, as the layoff threat had been, the employees would be placing their jobs in jeopardy by voting for union representation.

A large majority of the employees remained on the payroll at the time of the trial (Tr. 1232–1234; G.C. Exh. 29), and company officials and shop supervisors who were involved in committing the unfair labor practices remained the same.

Undoubtedly the discriminatory layoff of the seven employees leading the organizing drive, the delay in recalling most of them, and the threat to close or move the plant would have a long-lasting residual impact on the exercise of the employees' right to a fair election.

*Potential Effect of Traditional Remedies*. The Company contends in its brief (at 122–123) that a make-whole and cease-and-desist remedy would demonstrate to all employees that the "alleged discriminatees" were fully compensated for their time off and that the Company could not do this again. Therefore, these "traditional remedies will adequately assure that an NLRB election can be conducted in a fair and impartial manner." I do not agree.

The Company not only threatened to, and did, lay off union supporters during record sales for that time of the year, but it made it clear that if the employees voted for the Union, they would be jeopardizing their jobs. Employees were told that President Pippin was very rich, that the Company was "just like a toy" to him, that he did not care about the back orders, and that he would close or move the plant if the employees joined the Union. This conveyed to the employees the Company's unmistakable determination to flout the employees' Section 7 rights and to remain nonunion at all costs.

The Company gave no indication at the trial that it would respect the employees' Section 7 rights. It instead, as found, presented much fabricated testimony to disclaim responsibility for the unlawful threats, to deny any knowledge of the union organizing campaign at the time of the layoffs, and to prove the false lack-of-work defense. I find that a bargaining order is required to give the employees any real protection of their rights.

3. Concluding findings

After balancing all the competing considerations (including the preference for relying on the results of the Board's own elections rather than on cards), I find that the possibility of erasing the residual impact of the Company's unfair labor practices on the election process and ensuring a fair election by the use of traditional remedies is slight. I therefore find that the employee sentiment expressed through the authorization cards would, on balance, be better protected by a bargaining order.

Accordingly I find that the Company is required to bargain with the Union as the designated bargaining representative of its employees in the unit found appropriate, effective October 29, 1993, when the Union obtained valid authorization cards from a majority of the unit employees.

CONCLUSIONS OF LAW

1. By discriminatorily laying off Marcial Armendariz, Manuel Castillo, Salvador Cocoma, Porfirio Longoria, Miguel Pimentel, Francisco Rodriguez, and Juan Santillan on November 8, 1993, for supporting the Union, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By coercively interrogating employees about union activity and employee support of the Union, the Company violated Section 8(a)(1).

3. By threatening to layoff or terminate employees and to close or move the plant if the employees support the Union, the Company violated Section 8(a)(1).

4. Because the possibility of erasing the residual impact of the Company's unfair labor practices on the election process and ensuring a fair election by the use of traditional remedies is slight, the Company is required to bargain with the Union as the designated bargaining representative of its employees in the unit found appropriate, effective October 29, 1993, when the Union obtained valid authorization cards from a majority of the unit employees.

5. Tool sharpener Thaddeus Beres and over-the-road truckdriver Barney Grogan did not share a community of interest with the production and maintenance employees and were not in the bargaining unit.

6. Setup men Guadalupe Zapata and Feliciano Rodriguez were supervisors within the meaning of Section 2(11) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off seven employees, it must offer reinstatement to the one who has not been offered reinstatement and make all seven of them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of layoff to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). It must also bargain with the Union to remedy.

[Recommended Order omitted from publication.]